IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1421

GULF STATES UTILITIES COMPANY, *Petitioner,*

v.

SAM RAYBURN DAM ELECTRIC COOPERATIVE, MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION, FEDERAL POWER COMMISSION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SAM RAYBURN DAM ELECTRIC COOPERATIVE IN OPPOSITION

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
LAW OFFICES OF NORTHCUTT ELY
Watergate 600 Building, Suite 915
Washington, D.C. 20037

Attorneys for
Sam Rayburn Dam Electric Cooperative, Inc.

April 30, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	1
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	6
CONCLUSION	9

CITATIONS

CASES:

Appalachian Power Co. v. *FPC*, 529 F.2d 342 (D.C. Cir. 1976) 7, 8
Borough of Lansdale v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974) 7
Chemehuevi Tribe of Indians v. *FPC*, 420 U.S. 395 (1975) 7
Conway Corporation v. *FPC*, 510 F.2d 1264 (D.C. Cir.), *cert. granted*, 44 U.S.L.W. 3279 (1975) (No. 75-342) 7
FPC v. *Florida Power & Light Co.*, 404 U.S. 453 (1971) 7
FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) .3, 7, 8
Gulf States Utilities v. *FPC*, 411 U.S. 747 (1973) 7
Indiana and Michigan Electric Co. v. *Anderson Power and Light*, 414 U.S. 1068 (1973) 7
Richmond Power and Light v. *FPC*, 481 F.2d 490 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973) 7
Sam Rayburn Dam Electric Cooperative, Inc. v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975), *reh. den.* (January 12, 1976) 1, 4, 5
United Gas Pipeline Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 3, 7, 8
United States Steel Corp. v. *FPC*, — F.2d —, No. 74-2117 (D.C. Cir. March 24, 1976) 6

STATUTES:

Federal Power Act, Section 313(b), 16 U.S.C. § 825*l*(b) 2
28 U.S.C. § 1254(1) 2

RULES:

Federal Rules of Appellate Procedure, Rule 41(b) ... 5
Rules of the Supreme Court of the United States, Rule 19 .....6, 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1421

GULF STATES UTILITIES COMPANY, *Petitioner,*

v.

SAM RAYBURN DAM ELECTRIC COOPERATIVE, MID-SOUTH ELECTRIC COOPERATIVE ASSOCIATION, FEDERAL POWER COMMISSION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT SAM RAYBURN DAM ELECTRIC COOPERATIVE IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is *Sam Rayburn Dam Electric Cooperative, Inc.* v. *Federal Power Commission and Gulf States Utilities Co.*, 515 F.2d 998 (D. C. Cir. 1975), *rehearing denied* and *rehearing en banc denied* (January 12, 1976). The court of appeals opinion is reproduced in petitioner's Appendix A. The Federal Power Commission Orders of June 14, 1973, and August 7, 1973, affecting respondent Sam Rayburn

Dam Electric Cooperative, Inc., are reproduced in petitioner's Appendix D and Appendix E.

The jurisdiction of the court of appeals was founded on section 313 (b) of the Federal Power Act, 16 U.S.C. 825*l* (b). Petitioner's motion for a stay was denied by Mr. Chief Justice Burger on April 1, 1976, and petitioner's second motion for a stay was denied by the Court on April 19, 1976.

Jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Respondent takes exception to the statement of the "Questions Presented" by petitioner.

Instead, we submit that the question presented in the Sam Rayburn case is solely whether the court of appeals correctly interpreted a contract between petitioner and respondent, specifically (as stated by the court of appeals) whether Gulf States had reserved a right in its contract with Sam Rayburn to effect rate changes by unilateral application to a regulatory agency. The court of appeals answered in the negative, construing the contract to provide that rate changes could occur only by mutual agreement.

We point out that the cases below, No. 73-1996 (Sam Rayburn) and No. 73-2167 (Mid-South), were consolidated solely for the convenience of oral argument. The factual and legal questions involved in the two cases are dissimilar, as evidenced by the differing remand orders of the court of appeals, and the separate discussions of the cases in its opinion.

Our representation is solely on behalf of Sam Rayburn Dam Electric Cooperative, Inc.

STATEMENT OF THE CASE

Sam Rayburn Dam Electric Cooperative, Inc. (hereinafter "Sam Rayburn") is an organization comprised of two rural electric cooperative members[1] and four municipalities located in Texas and Louisiana.[2]

Sam Rayburn members are engaged in the generation, transmission, and distribution of electric energy. These public agencies serve electric energy to meet the needs of 150,000 people in the east Texas and west Louisiana area. Sam Rayburn and its members purchase a portion of their electric power requirements from the petitioner, Gulf States Utilities Company.

On April 10, 1973, Gulf States filed with the Federal Power Commission an application to increase rates for electric power sales to its wholesale customers, including Sam Rayburn. Sam Rayburn filed a Protest and Motion to Reject the Filing on the grounds that the unilateral filing was in violation of: (i) the contract between the parties; (ii) the *Sierra-Mobile* doctrine established by this Court. *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The FPC disagreed with Sam Rayburn, interpreting the Sam Rayburn-Gulf States contract as allowing unilateral rate increase filings.

Sam Rayburn thereafter petitioned the court of appeals for review.

The court of appeals reversed the FPC, holding that the Sam Rayburn-Gulf States contract barred the uni-

---

[1] Sam Houston Electric Cooperative and Jasper-Newton Electric Cooperative.

[2] City of Jasper, Texas; City of Livingston, Texas; City of Liberty, Texas; and Town of Vinton, Louisiana.

lateral application for a rate increase. *Sam Rayburn Dam Electric Cooperative, Inc.* v. *FPC,* 515 F.2d 998 (D. C. Cir. 1975).

In its opinion, the court of appeals explained the applicable law:

> "In companion cases, FPC v. Sierra Pacific Power Co. and United Gas Pipe Line Co. v. Mobile Gas Service Corp., the Supreme Court announced the so-called *Sierra-Mobile* doctrine. It there ruled that, except in rare cases, the Federal Power Commission has no power under the Federal Power Act or the Natural Gas Act, to accept for filing rates that contravene existing contracts. This court has applied and reaffirmed the doctrine consistently, most recently in City of Richmond v. FPC. The *Sierra-Mobile* doctrine does not, of course, dictate that unilateral rate changes may never be accepted by the Commission. In United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division, the Supreme Court made clear that the Commission has power to accept unilateral rate changes for filing when they are submitted by a seller that, in contracting with its customers, has 'reserved to [itself] the power to make rate changes in this manner.'" (Footnotes omitted.) *Id.* at 1002-03.

As to the issue in the case, the court of appeals said:

> "When Gulf States attempted to file its 1973 revised rate schedule, the question then presented to the FPC was whether Gulf States had reserved the power in its contract with Sam Rayburn to effect rate changes by unilateral application to a regulatory agency." *Id.* at 1003.

The court then said "[a]pproaching this decision of the Commission with the deference to which it is entitled, we still are constrained to disagree with it." (Footnote omitted.) *Id.*

After reviewing the *Sierra-Mobile* doctrine and provisions of the contract, the court said (p. 1005):

> "These extrinsic considerations *reinforce the unmistakable sense of the language* of the Sam Rayburn-Gulf States contract, *i.e.,* that it was always intended by both parties to create a *Sierra*-type agreement." (Emphasis added.)

And the court held:

> "Here, as in past cases, the FPC has 'attempted what may charitably be termed an "end run"' around the doctrine [*Sierra-Mobile*] by straining to transform a contract that is unmistakably of the *Sierra* variety into a *Memphis*-type agreement. In view of the plain import of the contract language and the extrinsic materials available to this court for consideration, the FPC's decision is reversed. The case is accordingly remanded to the FPC, not for reconsideration, but with instructions to reject the proposed increase in rates for the supply of power pursuant to the Sam Rayburn-Gulf States contract." (Footnote omitted) *Id.* at 1005.

Petitioner applied for rehearing and for rehearing *en banc.* That petition was denied. Gulf States then applied, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, for a stay of mandate pending application for certiorari. As is its custom, the court of appeals granted the stay for 30 days on January 28, 1976. On March 19, 1976, the court of appeals denied Gulf States' motion "for extension of order staying mandate."

Gulf States next applied on March 24, 1976, to Mr. Chief Justice Burger for a stay. The application was denied on April 1, 1976. Subsequently, in a letter to the Office of the Clerk, petitioner resubmitted its stay

application to Mr. Justice Powell, who referred the application to the entire Court. The Court denied the second stay application on April 19, 1976.

REASONS FOR DENYING THE WRIT

As evident from the opinion of the court of appeals and the statement of the case presented by petitioner and respondent, Sam Rayburn, petitioner's reason for seeking certiorari relates strictly to what petitioner views as an unfavorable interpretation of a contract by the court of appeals. The petition accuses the court of appeals of "judicial liberality" (Petition at 16), invokes visions of "unprecedented inflation," the "national importance of assuring proper rate regulation," and an energy supply crisis. (Petition at 7.) In the words of Mr. Justice Clark: "There is much hue and cry to this claim, but alas there is no wolf." *United States Steel Corp.* v. *FPC*, — F.2d —, No. 74-2117, slip op. at 9 (D.C. Cir. March 24, 1976). There is much "hue and cry" here over a matter of contract interpretation, *i.e.*, whether the contract permits Gulf States to unilaterally implement rate increases by filing with the Federal Power Commission or whether the contract permits rate increases only by mutual agreement. That was the issue addressed by the court of appeals, and the contract interpretation decided by the court of appeals is the reason for Gulf States applying for a writ of certiorari.

Petitioners have failed to present a showing required by Rule 19 of the United States Supreme Court. There are no "special and important reasons" to justify the granting of certiorari.

The case is not of national or regional importance, but involves only the interpretation of a specific contract relating to one specific transaction. Unlike other power industry cases that the Court has reviewed, the instant case does not involve previously unsettled questions relating to the FPC's nationwide licensing authority as in *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395 (1975), or other broad questions of the Federal Power Commission's jurisdiction, as in *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453 (1971), or antitrust considerations, as in *Gulf States Utilities* v. *FPC*, 411 U.S. 747 (1973), or the relation of federal and state rate regulation, as in *Conway* v. *FPC*, No. 75-342, pending.

The court below, far from deciding an important question of federal law which has not been, but should be, settled by this Court, has applied, correctly, the rule firmly settled by this Court in the *Sierra and Mobile* cases,[3] a doctrine with which the court of appeals is quite familiar and experienced. *E.g., Appalachian Power Co.* v. *FPC*, 529 F.2d 342 (D.C. Cir. 1976); *Borough of Lansdale* v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974); *Richmond Power & Light* v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973). No unsettled question of national importance exists with respect to contract interpretation in cases involving the *Sierra-Mobile* doctrine. In the *Richmond* case, *supra*, a case similar to the instant case, the Supreme Court denied certiorari. *Indiana and Michigan Electric Co.* v. *Anderson Power and Light of the City of Anderson*, 414 U.S. 1068 (1973).

As the court of appeals recently said:

> "The rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the par-

[3] FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

> ties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." *Appalachian Power Co., supra* at 346.

The court of appeals' observation applies to our own case.

This is not a case where "a court of appeals has rendered a decision in conflict with the decisions of another court of appeals" nor is it a case involving an important state or territorial question, nor is it a case where the court of appeals has "far departed" from the usual course of judicial proceedings. It simply applied the settled rule of the *Sierra* and *Mobile* cases, and did so correctly.

And the petition does not meet any of the other criteria stated in Rule 19.

The Federal Power Commission and the United States Solicitor General have not applied for certiorari.

CONCLUSION

Since petitioner has failed to meet any of the criteria of Rule 19 relating to petitions for certiorari, and since this case involves only a matter of contract interpretation as to which the court correctly applied the *Sierra-Mobile* doctrine, we respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
LAW OFFICES OF NORTHCUTT ELY
Watergate 600 Building, Suite 915
Washington, D.C. 20037

Attorneys for
Sam Rayburn Dam Electric Cooperative, Inc.

April 30, 1976